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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MB Docket No. 02-335  
Table of Allotments, ) RM-10545  
FM Broadcast Stations )  
(Hart, Pentwater and )  
Coopersville, Michigan) )

TO: Assistant Chief, Audio Division  
Media Bureau

**REPLY COMMENTS OF WATZ RADIO, INC**  
**REQUESTING DISMISSAL OF "COUNTERPROPOSAL"**

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January 15, 2003

**WATZ RADIO, INC.**

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## **SUMMARY**

WATZ Radio, Inc. ("WATZ"), licensee of FM Broadcast Station WATZ-FM, Channel 257C2 (99.3 MHz), Alpena, Michigan, hereby respectfully submits its Reply Comments in the above-captioned proceeding.

WATZ urges the Commission either to summarily reject and dismiss the December 30, 2002 pleading styled "Counterproposal" by Fort Bend Broadcasting Company (Fort Bend), or, in the alternative, adopt a new "Notice of Proposed Rulemaking", with its own comment/counterproposal and reply comment dates. This is because Fort Bend's submission is "contingent upon, not in conflict with" the Waters/Synergy proposal because Channel 287 cannot be assigned to Glen Arbor, Michigan absent the relocation of WCXT(FM), Channel 287C2, Hart, Michigan. Therefore, the Fort Bend submission not a valid "counterproposal".

Instead, WATZ Radio, Inc. urges the Commission to expeditiously grant the "Petition for Rulemaking" filed by Waters Broadcasting Corp. and Synergy Media, Inc. relative to the relocation of WCXT(FM) from Hart to Coopersville, Michigan.

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December 30, 2002 pleading styled "Counterproposal" by Fort Bend Broadcasting Company (Fort Bend), or, in the alternative, adopt a new "Notice of Proposed Rulemaking", with its own comment/counterproposal and reply comment dates. This is because Fort Bend's submission is "contingent upon, not in conflict with" the Waters/Synergy proposal because Channel 287 cannot be assigned to Glen Arbor, Michigan absent the relocation of WCXT(FM), Channel 287C2, Hart, Michigan. Therefore, the Fort Bend submission not a valid "counterproposal". Fort Bend's "Counterproposal" is really a subterfuge to deny WATZ its procedural due process rights before the Commission.

**Facts Underlying Fort Bend's Submission**

3. Fort Bend is the licensee of WBNZ(FM), Channel 257 (99.3 MHz), Frankfort, Michigan. Fort Bend's use of Channel 257 at any class, present or proposed, is not in conflict with either Channel 287C2 (105.3 MHz) at Hart, Channel 287B at Coopersville, or Channel 231C2 (94.1 MHz) at Pentwater or Hart.

4. Rather, Fort Bend seeks to upgrade FM Broadcast Station WBNZ, Channel 257C2, Frankfort, Michigan, to Class C1 status. According to Fort Bend, as a relocated Class C1 station, WBNZ would be 54.46 kilometers short-spaced to WATZ-FM, Alpena, Michigan; the proposed WBNZ transmitter site is 169.56 kilometers from the existing WATZ-FM

transmitter site, and Section 73.207 of the Commission's Rules requires a spacing of 224 kilometers between co-channel Class C1 and C2 stations. Therefore, Crystal and Fort Bend need to find a new channel for WATZ-FM.

5. Frankfort, Michigan is located in northwestern lower Michigan's Benzie County. According to Fort Bend (at Exhibit E-6 of its "Counterproposal"), Frankfort's geographic coordinates are N. Lat. 44° 38' 00", W. Long. 86° 14' 03". Hart, Michigan is the county seat of Oceana County, Michigan, and its reference coordinates are N. Lat. 43° 51' 33", W. Long. 86° 18' 27" (**NPRM** at n. 6). Coopersville, Michigan is located in northern Ottawa County, Michigan, and the reference coordinates listed in the **NPRM** (at n. 5) are N. Lat. 43° 20' 36", W. Long. 85° 52' 16".

6. Using the FCC website's program for determining the distances between two sets of coordinates, the Frankfort and Hart reference points are 86.222 kilometers (53.576 miles) apart; and the Frankfort and Coopersville reference points are 146.263 kilometers (90.883 miles) apart.

7. WATZ is licensee of WATZ-FM, Channel 257C2 (99.3 MHz), Alpena, Michigan. The WATZ-FM transmitter site is located at N. Lat. 44° 51' 25", W. Long. 83° 32' 34" ("Counterproposal", Exhibit E-2, and FCC CDBS "FM Query" website). The Alpena and Frankfort reference coordinates are 214.595 kilometers (133.343 miles) apart; the Alpena and

Hart reference coordinates are 246.730 kilometers (153.311 miles) apart; and the Alpena and Coopersville reference points are 251.086 kilometers (156.018 miles) apart.

8. The Waters/Synergy rulemaking proposal publicly announced by the FCC in the above-entitled case involved Channels 287 and 231 in west Michigan. There is no possible way that WATZ could have been put on notice that its frequency Channel 257C2 at Alpena could be placed in jeopardy as the result of the issuance of the "Notice of Proposed Rulemaking" in the above-captioned proceeding. Were Fort Bend's "Counterproposal" to be accepted for filing and put out on a public notice for further comments, WATZ-FM's own ability to improve WATZ-FM or advance a competing proposal would be thwarted.

**The "Counterproposal" Is Not a Proper Counterproposal**

9. The use of Channel 257 at Frankfort, at whatever class and power level, is not mutually-exclusive with the use of either Channel 287 at Hart or Coopersville or Channel 231 at either Pentwater or Hart, at whatever class and power level. How Fort Bend attempts to link Channel 257 in northwestern lower Michigan to the use of Channel 287 at Hart and Coopersville is to propose the use of Channel 287A at Glen Arbor to replace Channel 223A, which Fort Bend proposes to move from Glen Arbor to Frankfort.

10. Channel 287A is not available for assignment at Glen Arbor were WCXT(FM) to remain licensed to Hart. According to the Commission's database, WCXT's licensed Class C2 facility (BLH-20011019AAD) is located at N. Lat. 43° 40' 34", W. Long. 86° 14' 20". The Glen Arbor community coordinates assumed by Fort Bend, N. Lat. 44° 53' 50", W. Long. 85° 59' 06", are 137.191 kilometers (85.247 miles) north of WCXT(FM)'s transmitter site; Section 73.207 of the Rules calls for a spacing between co-channel A and C2 facilities of 166 kilometers (103 miles)—rendering a proposed use of Channel 287A at Glen Arbor some 28.809 kilometers (17.9 miles) short. Therefore, Channel 287A would not be available for assignment at Glen Arbor unless and until WCXT(FM)'s rulemaking proposal for Coopersville were granted, a construction permit were granted and their covering license for the newly constructed Coopersville facility were granted.

11. Therefore, it is readily seen that the Fort Bend "counterproposal" is contingent upon, and not in conflict with, the granting of the Hart/Coopersville/Pentwater petition. The Commission held in *FM Table of Allotments, Milton, West Virginia and Flemingsburg, Kentucky*, 11 FCC Rcd 6374 (1996), that, to have a valid "counterproposal", the channel proposed must be "in conflict", not "contingent upon". See also *FM Table of Allotments, Indian Springs*,



*Nevada et al*, 14 FCC Rcd 10568 (1999); **FM Table of Allotments, Angel Fire, New Mexico et al**, 15 FCC Rcd 11657, n. 4 (2000); *Television Table of Allotments, Wilmington, North Carolina*, 6 FCC Rcd 6969, 6971 (1991).

12. Therefore, since the linchpin for the whole Fort Bend proposal, the allocation of Channel 287 at Glen Arbor, cannot possibly be made under any circumstances until the relocation of WCXT(FM), Hart to a new transmitter site in proximity to Coopersville, the proposed reallocation of Channel 257 to Garfield Township, Michigan—the real aim of Fort Bend's submission—is not a valid "counterproposal".

13. Furthermore, WATZ wishes to remind the Commission of its obligations under the Administrative Procedure Act, 5 U.S.C. 5551 et seq. In rulemaking proceedings, the Commission must "fairly apprise interested persons of the subjects and issues [of the rule making]", and the ultimate rules adopted must be a "logical outgrowth" of the proposals contained in the duly given notice. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C.Cir.2983). The focus of the "logical outgrowth" test, is whether a party "should have anticipated that such a requirement might be imposed." *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (1991). The District of Columbia Circuit has written that "[m]ore to the point, however, this court has made it clear that an agency may not turn the provision

of notice into a bureaucratic game of hide and seek". **MCI Telecommunications Corp. v. FCC**, 51 F.3d 1136, 1142 (D. C. Cir. 1995). Indeed, the Commission has recognized that channel substitutions impose a burden on licensees and cause inconvenience for listeners and thus permits such substitutions only upon a finding that these disruptions are justified by public interest benefits. **FM Table of Allotments, Blair, Nebraska**, 8 FCC Rcd 4086, n. 8 (1993).

14. As demonstrated above, the channel in which Fort Bend has an interest, Channel 257 in Frankfort, is in no way "in conflict" with either Channel 287 at Hart or Coopersville or Channel 231 at Pentwater or Hart. With respect to its attempt to make Channel 257 be in conflict with the use of Channel 287, Fort Bend had to drag into this case an application for an unbuilt station at Glen Arbor. Fort Bend has no standing to seek channel changes for other licensees or applicants, such as George S. Flinn, Jr., the "singleton" applicant for Channel 227A at Glen Arbor (File No. BPH-19970724M4).

15. With respect to Glen Arbor, even assuming that the Fort Bend submission could be put out for public comment as a valid "counterproposal", Fort Bend's submission was not even complete as of December 30, 2002, because George S. Flinn, Jr., the "singleton applicant" on Channel 227A at Glen Arbor, Michigan, did not personally sign his

"Declaration" consenting to the channel switch at Glen Arbor to Channel 287A (see Exhibit A hereto). Rather, Mr. Flinn's name was signed "by JTN", presumably J. Thomas Nolan, an associate attorney in the Shook, Hardy and Bacon law firm that has appeared in this proceeding on behalf of Fort Bend. The failure of Mr. Flinn to personally sign this "Declaration" is fatal to its validity. In **FM Table of Allotments, Carmel, California et al**, 7 FCC Rcd 3056, ¶11 (1992), the Commission stated:

A basic requirement of a rule making proceeding for an FM allotment is a statement of interest in the channel to be allotted. The proponent of an allotment proposal, to be bona fide, must state an interest in the channel, a present intention to apply for the channel if an allotment is granted, as well as an intention to promptly construct a station. **This statement may only be made by the party who holds that intent, and may not be made on behalf of a party who has not come before the Commission to state its own intent.** [emphasis supplied]

A "Declaration" is defective where it fails to contain a signature by the person whose statement it purports to be, and the date upon which it was signed. **Webster-Fuller Communications Association**, 4 FCC Rcd 1438, ¶2 (Rev. Bd. 1989). In **Clyde W. Pierce**, 2 FCC Rcd 3522 (1987), the Commission rejected a signature of an attorney (in lieu of a client's signature), the existence of a power of attorney notwithstanding, where there was no explanation as to the absence of the applicant/client. In the instant case, Flinn

is not even a client of "JTN" (on information and belief, his attorney is Stephen C. Simpson, Esq.).

16. The significance of the lack of a proper signature on the "Flinn Declaration" is crucial in this case, because it is black letter law that counterproposals must be "technically correct and substantially complete" by the deadline for their filing. ***FM Table of Allotments, Carlisle, Kentucky***, 12 FCC Rcd 13181 (1997); ***FM Table of Allotments, Fort Bragg, California***, 6 FCC Rcd 5817 (1991); ***FM Table of Allotments, Provincetown, Massachusetts***, 8 FCC Rcd 19 (1992); ***FM Table of Allotments, Sanford, North Carolina***, 12 FCC Rcd 1 (1997). Because the Flinn Declaration is fatally defective, the entire Fort Bend "counterproposal" must be summarily rejected.

**Fort Bend/Roy Henderson**  
**FM Table of Allocation Activities**

17. Roy Henderson was involved in the events in MM Docket No. 01-115, where a proposal to allocate Channel 295A (106.9 MHz) at Au Gres in northeastern lower Michigan was suddenly turned into a proceeding to allow the move-in of WBNZ(FM), Frankfort on totally unrelated Channel 257 (99.3 MHz) to the largest city in northwestern lower Michigan, Traverse City. That flawed proposal was stoutly opposed by WATZ and others. Apparently, when Henderson learned that his Au Gres gambit was going to fail, he sought to

commandeer another proceeding, which turned out to be MB Docket No. 02-335. Apparently, Fort Bend is very scared of having its various proposals go through a proper and fair "notice and comment" rulemaking proceeding. Fort Bend's modus operandi is to try to put its proposal over in a "counterproposal" where no further "counterproposals" are allowed. Should the Commission permit this, the Commission would be violating the administrative due process rights of parties such as WATZ, who have not received proper notice and a right to be heard.

18. Because of the unusual nature of this case and the sudden attempt to dismiss the Au Gres case (MM Docket No. 01-115), WATZ requests the Commission to investigate the facts and circumstances regarding the circumstances surrounding the filing of the Au Gres and Frankfort proposals. Should it turn out that these filings were done in concert or were otherwise a subterfuge, Fort Bend's instant "counterproposal" should be immediately dismissed or denied<sup>1</sup>. See **Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission Processes ("Abuses of Processes")**, 5 FCC Rcd 3911 (1990).

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<sup>1</sup>This is not the first time that Henderson has been implicated in a scheme of this type—that is, to try to ram through a change in the FM Table of Allotments and prevent the opportunity for counterproposals. **FM Table of Allotments, Pitkin, Louisiana et al (MM Docket No. 99-26)**, 15 FCC Rcd 17311 (2000). While Henderson was cleared of wrongdoing in that docket, the circumstances in the AuGres/Frankfort proceeding are disturbing, and worthy of investigation by the Commission.

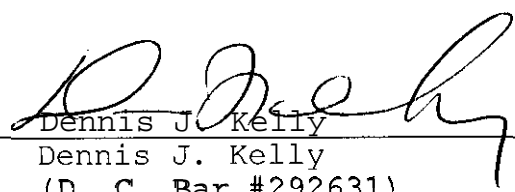
19. WATZ's interest is that Fort Bend seek improvements to its facilities legally, without subterfuge, and without a violation of WATZ's administrative rights. The instant "Counterproposal" is an invalid one for **all** of the reasons assigned above, and it must be categorically dismissed or denied.

**Conclusion**

**WHEREFORE**, WATZ Radio, Inc. urges that (1) the December 30, 2002 "Counterproposal" advanced by Fort Bend Broadcasting Company **BE DISMISSED OR DENIED** as an improper "Counterproposal" in violation of Section 1.420(d) of the Rules and the case law decided pursuant to that subsection, and (2) that the Petition for Rulemaking filed by Waters Broadcasting Corp. and Synergy Media, Inc. **BE GRANTED** as that petition relates to Hart, Coopersville and Pentwater, Michigan.

Respectfully submitted,

**WATZ RADIO, INC.**

By   
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January 15, 2003

## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing "Reply, etc." was served by first-class United States mail, postage prepaid, on this 15<sup>h</sup> day of January, 2003 upon each of the following:

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